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In The

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,
v.
MARIA STAPLETON, ET AL., *Respondents*.
[Additional Case Captions Listed Inside Front Cover]

On Writs of Certiorari to the Court of Appeals for the Third, Seventh, and Ninth Circuits

BRIEF OF *AMICI CURIAE* COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, CARDINAL NEWMAN SOCIETY, PACIFIC JUSTICE INSTITUTE, BELMONT ABBEY COLLEGE, BENEDICTINE COLLEGE, COLORADO CHRISTIAN UNIVERSITY, JOHN PAUL THE GREAT CATHOLIC UNIVERSITY, LIBERTY UNIVERSITY, NORTHEAST CATHOLIC COLLEGE, SOUTHERN NAZARENE UNIVERSITY, ST. GREGORY'S UNIVERSITY, THE THOMAS MORE COLLEGE OF LIBERAL ARTS, AND WYOMING CATHOLIC COLLEGE IN SUPPORT OF PETITIONERS

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[ADDITIONAL CASE CAPTIONS]

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners*,
v.
LAURENCE KAPLAN, *Respondent*.

DIGNITY HEALTH, ET AL., *Petitioners*,
v.
STARLA ROLLINS, *Respondent*.

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BRIEF OF *AMICI CURIAE* COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, CARDINAL NEWMAN SOCIETY, PACIFIC JUSTICE INSTITUTE, BELMONT ABBEY COLLEGE, BENEDICTINE COLLEGE, COLORADO CHRISTIAN UNIVERSITY, JOHN PAUL THE GREAT CATHOLIC UNIVERSITY, LIBERTY UNIVERSITY, NORTHEAST CATHOLIC COLLEGE, SOUTHERN NAZARENE UNIVERSITY, ST. GREGORY'S UNIVERSITY, THE THOMAS MORE COLLEGE OF LIBERAL ARTS, AND WYOMING CATHOLIC COLLEGE IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae Council for Christian Colleges & Universities, Cardinal Newman Society, Benedictine College, Belmont Abbey College, Colorado Christian University, John Paul the Great Catholic University, Liberty University, Northeast Catholic College, Southern Nazarene University, St. Gregory's University, The Thomas More College of Liberal Arts, and Wyoming Catholic College are institutions that provide faith-based and religiously-focused educational services, either directly or through their members. *Amicus* Pacific Justice Institute is a nonprofit public interest law firm that advocates on behalf of those

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the brief's preparation or submission. All parties have consented in writing to the filing of this brief.

who seek to exercise their rights to free religious exercise. *Amici* share a common concern that Respondents' interpretation of the Establishment Clause—if adopted by this Court—would broadly foreclose any government accommodation of religious exercise and thus impose severe burdens on religious colleges and universities, as well as other faith-based organizations.

Amicus Council for Christian Colleges & Universities (CCCU) is an international association of more than 140 colleges and universities enrolling over 460,000 students that exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." Member institutions are required "[to] have a public, board approved institutional mission or purpose statement that is Christ-centered and rooted in the historic Christian faith." Member institutions with voting privileges are required to hire only devoted Christians as full-time faculty, staff, and administrators. The CCCU's members are affiliated with 35 Protestant denominations and the Catholic Church. In addition, 20 percent of member institutions are independent, unaffiliated with any specific denomination or religious hierarchical structure.

Amicus the Cardinal Newman Society is a religious nonprofit organization founded to promote and defend faithful Catholic education. The Society seeks to fulfill its mission in numerous ways, including supporting education that is faithful to the teaching and tradition of the Catholic Church; producing and disseminating research and publications on developments and best practices in Catholic education; and keeping Catholic leaders and families informed.

Amicus Pacific Justice Institute (PJI) is a public interest law firm that provides pro bono legal services in cases implicating First Amendment rights, particularly in cases involving religious liberty. PJI is concerned that the arguments of Respondents and their *amici* could significantly impair the religious exercise of the hundreds of churches and other religious nonprofit ministries that PJI has represented.

The religious character and mission of the collegiate *amici* are set out below:

Amicus Belmont Abbey College is a private Catholic college founded and operated by Benedictine monks. Belmont Abbey College is "guided by the Catholic intellectual tradition and the Benedictine spirit of prayer and learning," and its mission is "to educate students in the liberal arts and sciences so that in all things God may be glorified."

Amicus Benedictine College is sponsored by the monks of St. Benedict's Abbey and the sisters of Mount St. Scholastica Monastery in Atchison, Kansas, and ordered to the Benedictine goal of wisdom lived out in responsible awareness of oneself, God and nature, family and society. Its mission as a Catholic, Benedictine, liberal arts, and residential college is the education of men and women within a community of faith and scholarship.

Amicus Colorado Christian University (CCU) is an evangelical Christian university with a main campus located near Denver, Colorado and several satellite campuses throughout Colorado. CCU has over 4,500 students in more than 35 undergraduate and graduate programs. CCU cultivates knowledge and love of God in a Christ-centered community of learners and scholars, with an enduring commitment to the

integration of exemplary academics, spiritual formation and engagement with the world. CCU provides its employees with health benefits through a church plan health system.

Amicus John Paul the Great Catholic University, founded in 2003 and headquartered in Escondido, California, seeks to impact culture for Christ by forming students as creators, innovators, leaders, and entrepreneurs at the intersections of media, business, and theology, guided by the teachings of Jesus Christ as preserved by His Catholic Church.

Amicus Liberty University is an evangelical Christian institution of higher education located in Lynchburg, Virginia. Founded by Dr. Jerry Falwell in 1971, Liberty maintains the vision of its founder by developing Christ-centered men and women with the values, knowledge and skills essential to impact the world. Through its residential and online programs, services, facilities and collaborations, Liberty educates men and women who will make important contributions to their workplaces and communities, follow their chosen vocations as callings to glorify God, and fulfill the gospel's Great Commission. With a residential enrollment of more than 15,000 students and a total enrollment exceeding 110,000, Liberty is now the largest private, nonprofit university in the nation, the largest university in Virginia, and the largest Christian university in the world. Liberty offers undergraduate, graduate, and professional programs in more than 550 unique programs of study, including programs in aeronautics, business, cinematic arts, counseling, divinity, education, engineering, law, nursing and medicine. Liberty is a member of the Big South Conference and has 20 NCAA Division I athletic programs.

Amicus Northeast Catholic College, founded in 1973 and headquartered in Warner, New Hampshire, seeks to serve its students, their families, the Church, and society by providing a premier Catholic liberal arts education that is faithful to the Magisterium and rooted in a vibrant liturgical and sacramental culture, calling all within the collegiate community to a life of intellectual exercise, service, and faithful discipleship.

Amicus Southern Nazarene University (SNU), founded in 1899, is a private, Christian, liberal arts university and a service of the Church of the Nazarene. Located on a 40-acre campus just west of Oklahoma City, SNU grew out of several small colleges committed to training people for service to God and their fellow man. More than 32,000 alumni work and serve throughout the United States and the world. SNU and the Church of the Nazarene are committed to Christian higher education, the pursuit of knowledge, the development of Christian character, and the equipping of leaders to accomplish their God-given calling of serving in the Church and in the world.

Amicus St. Gregory's University, founded in 1915 and headquartered in Shawnee, Oklahoma, promotes the education of the whole person in the context of a Christian community in which students are encouraged to develop a love of learning and to live lives of balance, generosity, and integrity. As Oklahoma's only Catholic university, St. Gregory's reaches out to members of other faiths who value the distinctive benefits that it offers.

Amicus The Thomas More College of Liberal Arts, founded in 1978 and headquartered in Merrimack, New Hampshire, (1) publicly professes an institutional commitment to the Catholic Faith; (2) promotes

reflection upon the "growing treasury of human knowledge" in light of the Catholic Faith; (3) promises fidelity to the Gospel as taught by the living Magisterium of the Roman Catholic Church; and (4) seeks to instill in its students the desire to serve the common good through works of justice and charity, to answer the Church's universal call to holiness, and to serve the Church's mission of the evangelization of the world.

Amicus Wyoming Catholic College seeks to educate the whole person in mind, spirit, and body through a classical liberal arts curriculum, aided by a rich Catholic environment and an exciting outdoor leadership program. This environment, fostered through the College's community of students, faculty, and staff, is promoted through carefully-chosen student life norms, fostered by a faculty dedicated to Catholic principles, and achieved with the assistance of an administrative staff committed to governing the College in accordance with Catholic morals and norms.

INTRODUCTION

This Court has repeatedly held that the government may exempt religious entities from generally applicable laws "without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987); *see also, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706–07 (2012) (upholding ministerial exception to the Americans with Disabilities Act, even though the ADA "is a valid and neutral law of general applicability"); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (upholding state tax exemption for churches).

In defiance of this principle, Respondent Plaintiffs—"buttressed by *Amicus Curiae* Freedom From Religion Foundation"—asserted below that "any exemption at all for church plans violates the Constitution by favoring religious adherents over non-adherents."[2] Indeed, Plaintiffs' *amici* have claimed that *any* religious exemption from "purely financial and regulatory burdens" is unconstitutional under *Lemon*.[3] In the alternative, Plaintiffs have argued that extending the church plan exemption to plans established by church agencies—i.e., not by the churches themselves—violates the Establishment Clause because it purportedly does "not alleviate a significant deterrent to religious exercise, takes no account of burden on non-adherents, [and/or] creates a greater entanglement with religion."[4]

These constitutional arguments are simply wrong. The church plan exemption, like countless other religious accommodations, fits comfortably within an "unbroken tradition of legislatively enacted regulatory exemptions." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre

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[2] *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 531 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 546 (U.S. Dec. 2, 2016) (No. 16-74) (internal citations omitted).

[3] Br. of The Freedom From Religion Foundation as *Amicus Curiae* in Support of Appellees at 7, 20–23, *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015) (No. 15-1172).

[4] Br. of Appellees at 38–43, *Kaplan v. St. Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015) (No. 15-1172); *see also* Br. of Appellee at 41–50, *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016) (No. 15-15351) (arguing that Congress may "condition a religious accommodation on corporate form and purpose" because that distinction, according to Plaintiffs, is not based on "religiosity").

Dame L. Rev. 1793, 1837 (2006). And the long tradition of governmental non-interference with church plans—whether established by churches or their agencies—confirms the exemption's constitutionality under *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

Amici expect that Plaintiffs and their *amici* will repeat these wrong-headed constitutional arguments—some of which have already been reiterated in their oppositions to certiorari—in an attempt to manufacture a constitutional question and thus invoke the avoidance doctrine as a reason for this Court to hold that Petitioners do not qualify for the exemption. But irrespective of how the Court resolves the statutory claim at issue, there is no question that the exemption is *constitutional*, both on its face and as applied—indeed, if there is any constitutional issue here, it cuts against Plaintiffs' interpretation of ERISA.

SUMMARY OF ARGUMENT

I. This Court has repeatedly held that the government may accommodate religion without running afoul of the Establishment Clause. The history of our Republic is laden with examples of religious accommodations—and the church plan exemption fits comfortably within this Court's precedents upholding those accommodations. Indeed, this Court has invalidated religious accommodations in only a few narrow circumstances—for example, where the government itself has sponsored religion through its own activities and influence; where the government imposes *religious* obligations on third parties; or where the accommodation confers a privileged status on a particular religious sect.

The church plan exemption implicates none of these concerns. Instead, the exemption relieves

churches and their agencies from the government intrusion and attendant burdens imposed by ERISA, consistent with a longstanding tradition of governmental non-interference in church pension plans.

II. This Court's recent decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), confirms the constitutionality of the church plan exemption. Under *Town of Greece*, the Establishment Clause "*must* be interpreted by reference to historical practices and understandings." *Id.* at 1819 (emphasis added) (citation and quotation marks omitted). Here, that historical inquiry reveals a tradition of governmental non-interference in church pension plans that stretches back to the early 1700s. Indeed, church pension plans have operated free from colonial and then federal regulation for *nearly three centuries*. In light of that history—and because "*any*" Establishment Clause test must be informed by historical practice, *see id.*—the church plan exemption easily passes constitutional muster.

III. If anything, it is Plaintiffs' interpretation of the church plan exemption—not Defendants'—that raises the specter of an Establishment Clause violation by privileging religious organizations that unify their operations in a single "church" organization over those that do not.

In sum, this Court should reject Plaintiffs' radical and ahistorical claim that the church plan exemption—whether on its face or as applied to plans established by church agencies—violates the Establishment Clause.

ARGUMENT

I. THE CHURCH PLAN EXEMPTION FITS COMFORTABLY WITHIN THIS COURT'S PRECEDENTS UPHOLDING RELIGIOUS ACCOMMODATIONS

The Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (explaining that the "ministerial exception [is] grounded in the Religion Clauses" of the First Amendment). In rejecting a challenge to a religious exemption similar to the one at issue here, the Court explained that "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation and quotation marks omitted). This view accords with the history of our Republic, which is laden with examples of religious exemptions. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1837 (2006) ("From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions."); *see also* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 & n.215 (1992) (identifying more than 2,000 state and federal statutes exempting religious groups from their coverage).

The church plan exemption falls squarely within this "unbroken tradition." It thus is constitutional both on its face and as applied.

A. Religious Accommodations May Afford Special Consideration To Religious Groups, Alleviate State-Imposed Religious Burdens, And Deny Benefits To Third Parties

1. This Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid." *Amos*, 483 U.S. at 338. To the contrary, the Court has stated that "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.*[5] The Court has thus upheld many exemptions that provide benefits exclusively to religious groups. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) (upholding section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which presumptively requires federal prisons to accommodate federal inmates' religious practices); *Amos*, 483 U.S. at 329

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[5] This Court has explicitly rejected the application of strict or even heightened scrutiny when analyzing a legislative accommodation of religion. *See Amos*, 483 U.S. at 339 ("The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end"). Any assertion that the government must meet a heightened showing reverses the presumption regarding the permissibility of rational legislative determinations in this area. *Cf. Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (observing that under the deferential rational basis standard, a legislative classification is accorded "a strong presumption of validity" and the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it").

(Congress may exempt churches from Title VII's anti-discrimination provisions); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (cities may permit public school children to leave school daily for religious observance and instruction).

The same principles apply with full force to Congress' decision to exempt religious institutions from the requirements of ERISA. The initial church plan exemption was designed to avoid the "unjustified invasion" of church confidentiality that would result if churches were forced to open their books to the scrutiny of government regulators. S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. The same concern lay behind the 1980 amendment to ERISA, which made clear that organizations "controlled by" or "associated with" a church may qualify for the church plan exemption. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1304 (1980) (codified at ERISA §3(33)(C), 29 U.S.C. §1002(33)(C)). As with the original enactment, the 1980 amendment was designed to prevent the government from dictating or curtailing the bounds of a church's mission or polity. *See* 124 Cong. Rec. 12107 (1978) (Conable) ("Present law fails to recognize that the church agencies are parts of the church in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged. . . . The churches consider their agencies as an extension of their mission."); 124 Cong. Rec. 16522 (1978) (Talmadge) ("Church agencies are essential to the churches' mission. They care for the sick and needy and disseminate religious instruction. They are, in fact, part of the churches.").

The 1980 amendment also had a second, more practical purpose of preserving mobility for church

employees. Absent the amendment, the original, restrictive church plan definition would have prevented churches from offering continuous coverage to ministers or lay employees who transferred between church and church agency work. As Representative Conable explained:

> A significant number of ministers and lay employees move frequently from church to agency and back in pursuance of their careers. A church may ask a rabbi to serve in an agency where his services are most needed. The rabbi may then return to pulpit work. The present definition of church plan does not satisfy the unique need of our churches to cover continuously their employees in one plan. If ministers and lay persons cannot be continuously covered by one plan, gaps in coverage will result, and they will not be free to pursue their work for the denomination as they should.

124 Cong. Rec. 12107 (1978); *see also* 124 Cong. Rec. 16522 (1978) (Talmadge) ("Employment is extremely fluid within our denominations. A minister will frequently move from church to agency, or wherever his services are most needed. . . . If the church plan definition is allowed to remain, ministers and lay employees will not be able to pursue their missions nearly as freely as they have in the past."). The amended church plan definition eliminated this problem, thereby preserving the free flow of personnel between churches and their agencies.

The church plan exemption relieves churches and their agencies from the government intrusion and attendant burdens imposed by ERISA. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 262–63 (1993)

(ERISA is "an enormously complex and detailed statute"). It also "fits within the corridor between the Religion Clauses: On its face, the [exemption] qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." *Cutter*, 544 U.S. at 720.[6]

2. Plaintiffs' core attack on the church plan exemption rests on two assertions—"An exemption available only to religious adherents *must* alleviate 'a significant state-imposed deterrent to the free exercise of religion,'" and "[a]n exemption that 'burdens non-beneficiaries markedly . . . cannot but convey a message of endorsement to slighted members of the community.'" Br. of Appellee at 40, *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015) (No. 15-1172) (emphasis added); *id.* at 45 (quoting *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989)).[7] Both are incorrect.

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[6] The fact that a religious entity may at times *choose* to comply with a government program or voluntarily share information with the government does not answer the constitutional question whether it is permissible to exempt religious entities from regulations that *compel* the disclosure of information. *But see* Br. of Appellees at 71, *Stapleton v. Advocate Healthcare Network and Subsidiaries*, 817 F.3d 517 (7th Cir. 2016) (No. 15-1368) (arguing that the church plan exemption does not comport with the purpose of avoiding examination of books and records because "Advocate participates in Medicare and Medicaid and issues tax exempt bonds; thus it already discloses its financial records and relationships in detail").

[7] *See also* Br. of Appellees at 68, *Stapleton*, 817 F.3d 517 (7th Cir. 2016) (No. 15-1368) ("Although the government may accommodate religious adherents when necessary to alleviate substantial governmental burdens on religious exercise, where, as here, a regulatory exemption provided exclusively to religious adherents does not alleviate a substantial burden on religious exercise,

Contrary to Plaintiffs' assertion, whether the church plan exemption is compelled by the Free Exercise Clause is irrelevant, because it is "well established . . . that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334 (internal quotation marks omitted). In other words, "there are some state actions permitted by the Establishment Clause but not *required* by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718–19 (2004) (emphasis added); *see also Cutter*, 544 U.S. at 713 ("[T]here is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." (citation and internal quotation marks omitted)); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1483 (6th Cir. 1995) (upholding a statutory accommodation that was not required by the Free Exercise Clause on the grounds that, "[t]he statute at issue in this litigation does not evidence governmental advancement of religion merely because special consideration is given to religious groups"). *Cf. Hosanna-Tabor*, 132 S. Ct. at 702 (religious exemption required by "both Religion Clauses"). Accordingly, this Court need not decide whether the Free Exercise Clause *requires* that the church plan exemption be extended to Petitioners and other church agencies in order to conclude that the exemption does not *violate* the Establishment Clause.

It is also of no moment that the church plan exemption as applied here allegedly imposes economic

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it violates the Establishment Clause if it imposes burdens on nonadherents or creates greater entanglement with religion.")

burdens on third parties, such as Plaintiffs. The Supreme Court has repeatedly upheld religious exemptions that imposed burdens—including the denial of statutorily created benefits—on third parties. For example, in *Amos* the Court upheld a religious exemption to Title VII that allowed religious organizations to terminate employees for religious reasons. 483 U.S. at 338–39. Even though the exemption in *Amos* had the effect of costing the plaintiff his job, the Court did not find an Establishment Clause violation. Similarly, in *Cutter*, the Court upheld RLUIPA against an Establishment Clause challenge, even though accommodating prisoners' religious practices imposed obvious burdens on prison administrators, prison guards, and, to a lesser degree, on other institutionalized persons. 544 U.S. at 725–26. So too with conscientious objection to military service, which imposes an obvious and substantial burden on third parties—someone must fight in the place of the conscientious objector. *See Gillette v. United States*, 401 U.S. 437 (1971) (upholding religious exemption from the draft). Any argument that the Establishment Clause is violated here on the basis of burdens imposed on third parties would call into question these and numerous other religious exemptions, including those protecting doctors with religious objections from being required to perform abortions. *See, e.g.*, 42 U.S.C. § 238n(a). The fact that the church plan exemption denies employees of churches and church agencies the "benefit" of ERISA-compliant pension plans simply does not indicate a constitutional problem.

B. The Church Plan Exemption Does Not Raise The Same Concerns That Have Led This Court To Strike Down Certain Religious Accommodations

This Court has invalidated religious accommodations in only a few narrow circumstances, none of which are present here.

For example, the Court has explained that a legislative accommodation of religion may run afoul of the Establishment Clause when it "devolve[s] into an unlawful fostering of religion"—that is, when "the *government itself*" has sponsored religion through "its own activities and influence." *Amos*, 483 U.S. at 334–35, 336–37 (internal quotation marks and citation omitted). Thus, in *Texas Monthly*, the Court held that the Establishment Clause prohibits the government from providing a preferential subsidy for the dissemination of religious ideas. 489 U.S. at 25; *see also id.* at 28 (Blackmun, J. concurring in the judgment) (exemption unconstitutional because Texas had "engaged in preferential support for the communication of religious messages").

Religious accommodations have also been found to violate the Establishment Clause when they impose *religious* obligations on third parties. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985). In *Thornton*, the Court struck down a Connecticut law that required employers to allow an employee to not work on his chosen Sabbath day. The Court held that the law "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," and thus "impose[d] on employers and employees an absolute duty to conform their business practices to the particular reli-

gious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates." *Id.*[8]

Finally, the Court has held that a religious accommodation may violate the Establishment Clause if it confers a "privileged status on any *particular sect*," or "singles out" one "faith for disadvantageous treatment." *Cutter*, 544 U.S. at 724 (emphasis added). For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court struck down a New York law that custom-designed a separate school district to serve exclusively a community of Hasidic Jews in part because the law "single[d] out a particular religious sect for special treatment." 512 U.S. 687, 706 (1994).

The church plan exemption "does not founder on [these] shoals." *Cutter*, 544 U.S. at 720. It does not subsidize religious evangelization, impose religious obligations on third parties, or favor any one religious group over another, and Plaintiffs have never claimed otherwise. Rather, the church plan exemption constitutes a constitutionally permissible choice by Congress—rooted in a long historical tradition, *see infra*

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[8] Plaintiff Kaplan cites *United States v. Lee*, 455 U.S. 252 (1982), in support of his argument that the exemption unconstitutionally "imposes substantial costs on nonadherents." Br. of Respondent in Opposition to Certiorari at 27, *Saint Peter's Healthcare System v. Kaplan*, 137 S. Ct. 546 (No. 16-86). But *Lee* addressed whether the requirement to pay social security taxes on behalf of one's employees violates the Free Exercise Clause, not the Establishment Clause. The Court's holding—that there is an overriding governmental interest in the social security system that justifies a burden on Free Exercise—is obviously of little relevance here. 455 U.S. at 260. Indeed, *Lee* explicitly avoided answering or engaging in any Establishment Clause inquiry. *Id.* at 260 n.11.

Part II—to relieve churches and their associated entities from regulations that may stifle religious practice and expression.

II. THE CHURCH PLAN EXEMPTION IS CONSTITUTIONAL UNDER THIS COURT'S RECENT DECISION IN *TOWN OF GREECE*

Largely ignoring this Court's accommodation cases, Plaintiffs and their *amici* have instead invoked numerous inapplicable, inapposite, or abrogated precedents.[9]

Rather than looking to Plaintiffs' proffered hodgepodge of cases—many of which are grounded in the much-criticized *Lemon v. Kurtzman*—this Court should follow its recent decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), and consider the history of the church plan accommodation. *See id.* at 1819. That historical inquiry reveals a tradition of governmental non-interference in church pension plans stretching back to the colonial era—and confirms that the church plan exemption is constitutional.

A. *Town Of Greece* Requires An Inquiry Into Historical Practice

As this Court recently explained in *Town of Greece*, courts must apply the Establishment Clause

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[9] *See, e.g.*, Br. of Appellees at 71–72, *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016) (No. 15-1368) (relying on *Wallace v. Jaffree*, 427 U.S. 38 (1985), and Justice O'Connor's concurrence in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 347 (1987) (O'Connor, J., concurring in the judgment)); *id.* at 69 n.56, 72 n.59, 73 n.61 (alternatively relying on *Lemon*); Br. of The Freedom From Religion Foundation as *Amicus Curiae* in Support of Appellees at 16, *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015) (No. 15-1172) (invoking *Lemon*).

"by reference to historical practices and understandings." *Id.* at 1819 (internal citation and quotation marks omitted). In this case, there is a long historical tradition of churches and their agencies providing retirement benefits for their employees, free from intrusive government oversight and regulation. This historical tradition unquestionably supports the constitutionality of the exemption at issue here.

1. Prior to *Town of Greece*, Establishment Clause jurisprudence was so muddled that it was essentially governed by "no standard whatsoever." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768, n.3 (1995) (plurality opinion). The so-called *Lemon* test—which attempted to focus the Establishment Clause inquiry on the purpose of the government action at issue, its effects, and whether it unduly entangles the government in religion, *see Lemon v. Kurtzman*, 403 U.S. 602, 611–12 (1971)—had been discredited, derided, and often ignored.[10] *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful [in the present case]."); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (collecting cases in which the Court did not apply *Lemon*); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 21

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[10] *Amici* refer to the "*Lemon* test" to encompass both the original three-part test announced in that case and the modified "endorsement" test that arose out of Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), which has been (at least sometimes) incorporated into the *Lemon* test. *See* 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (describing the "endorsement" test as "refin[ing] the definition" of establishment under *Lemon*).

(2011) (Thomas, J., dissenting from denial of certiorari) (noting that "five sitting Justices have questioned or decried the *Lemon* /endorsement test's continued use"); *Cty. of Allegheny*, 492 U.S. at 655 (Kennedy, J., dissenting) (collecting "[p]ersuasive criticism of *Lemon*").

Chief among the criticisms of *Lemon* was that its multi-part test was formless, arbitrary and ultimately unhelpful—so much so, in fact, that it left some judges to wonder whether, "had [the *Lemon* test] been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting); *see also Utah Highway Patrol Ass'n*, 132 S. Ct. at 14 (Thomas, J., dissenting from denial of certiorari) (the Court's "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon* /endorsement, or some other test, should apply in Establishment Clause cases"). Unguided by any objective inquiry, judges were left to "invoke the [Establishment] Clause to justify resolutions they favor ... for reasons having nothing to do with that clause or any other constitutional provision," with the natural result being that "courts, and, ultimately, the Supreme Court of the United States, have come to enjoy a tremendous measure of essentially legislative power to establish the terms of the relationship between church and state." Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 Loy. L.A. L. Rev. 27, 39 (1998).

Indeed, even the doctrine's supporters characterized it as little more than a collection of "useful guideposts," not concrete rules to be followed. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Yet, despite

more than two decades of criticism, the "ghoul" of *Lemon* lived on. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

Amid the confusion wrought by *Lemon*, the Court offered hope for clarity in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh*—which involved an Establishment Clause challenge to the Nebraska legislature's practice of opening its sessions with prayer—provided a new approach based not on *Lemon*'s amorphous and open-ended "guideposts" but instead on historical practice. Proceeding from the premise that history is an important guide to interpreting the Establishment Clause, the Court upheld Nebraska's legislative prayer because historical evidence showed that it was an accepted practice at the time of the Founding. *Id.* at 790–92; *see also id.* at 790 ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress."). Unfortunately, *Marsh* did not explain how its historical-evidence test fit with the rest of Establishment Clause jurisprudence, or how courts should apply *Marsh* beyond the particular context of legislative prayer. Thus, Justice Brennan, writing for the dissent, claimed that the decision had simply "carv[ed] out an exception" to the Court's Establishment Clause jurisprudence. *Id.* at 796 (Brennan, J., dissenting).

2. In 2014, after nearly three decades of uncertainty, *Town of Greece* affirmed the general applicability of *Marsh*'s historical inquiry as the proper test for Establishment Clause challenges. Although the plaintiffs in that case urged the Court to cabin *Marsh*, *see* Br. of Respondents at 20, 41–42, 46–47, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), Justice Kennedy,

writing for the majority, roundly rejected the assertion that *Marsh* was a mere "exception." *Town of Greece*, 134 S. Ct. at 1818–19. Instead, the Court held that *Marsh*, far from being a *sui generis* "carv[e] out," reinforces a much broader principle—that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Id.* at 1819 (emphasis added) (internal citation and quotation marks omitted). The Court further explained that:

> *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. *Any test* the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.

Id. (emphasis added). *Town of Greece* thus clarifies the relationship between *Marsh*'s historically-accepted practice test and the much-maligned *Lemon* /endorsement test: An inquiry into historical practice takes primacy over *any test*.

The Court's examination of history in *Town of Greece* was not an innovation. *See Hosanna-Tabor*, 132 S. Ct. at 702–04 (describing historical problems with English governmental control of church bodies and noting that "[i]t was against this background that the First Amendment was adopted")[11]; *Cty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in

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11 Indeed, *Hosanna-Tabor*—decided two years before *Town of Greece*—also found historical inquiry to be central to interpreting the Religion Clauses. In that case, involving whether the First Amendment shields a church's internal affairs—and specifically its personnel choices—from governmental interference, the Court included a lengthy discussion of historical government

part and dissenting in part) ("*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understanding.")

In fact, *Town of Greece* is entirely in keeping with the historical method routinely applied by the Court in other areas of constitutional law, particularly with respect to the Bill of Rights. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611 (1999) (explaining the prevalence of the historical approach in constitutional interpretation). But *Town of Greece* made explicit that judicial examination of "historical practices and understandings" is now mandatory in Establishment Clause cases. 134 S. Ct. at 1819.

Only a month after *Town of Greece*, two Justices reiterated that the *Lemon* test had finally been laid to rest. Explaining that "*Town of Greece* left no doubt that the Establishment Clause must be interpreted by reference to historical practices and understandings," Justices Scalia and Thomas noted that continued adherence to *Lemon* and the "endorsement test" would be nothing less than "mistat[ing] the law." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 n.*, 2284–85 (2014) (Scalia, J., dissenting from denial of certiorari).

Unfortunately, the lesson of *Town of Greece* has not been uniformly understood—the *Elmbrook* dissenters' message notwithstanding. Although some

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practices before and at the time of the founding. 132 S. Ct. at 702–03. Based on this historical inquiry, the Court concluded that the Establishment and Free Exercise Clauses required that churches be given autonomy when selecting their ministers. *Id.* at 703.

judges have recognized *Town of Greece*'s true import,[12] others have failed properly to appreciate the Court's command that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added) (internal quotation marks omitted).[13] But the failure of some lower courts to heed the teaching of *Town of Greece* does not, of course, alter this Court's clear directive that "*any*" Establishment Clause test must be informed by historical practice. *Id.*

3. *Town of Greece* restored a measure of clarity and objectivity to an area of law that had been, for decades, a doctrinal wasteland populated by *Lemon*'s lost souls—inconsistent decisions with no grounding in neutral principles. To the extent this Court reaches the constitutional inquiry at all, it should reiterate

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12 *See, e.g.*, *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (*Town of Greece* "confirmed" that "long-accepted usage" and "customary practice" trump other Establishment Clause tests); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part) ("*Town of Greece* is apparently a major doctrinal shift regarding the Establishment Clause[.]"); *cf. Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014) ("*Marsh* and *Greece* observe that the meaning of the Constitution's religion clauses depends in part on historical practices.").

13 *See, e.g.*, *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 589 (6th Cir. 2015) (asserting that *Town of Greece* "does not address the general validity of the endorsement test at all; it simply explains why a historical view was more appropriate in the case at hand"); *see also Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 n.12 (2d Cir. 2014) (following *Lemon* in a post-*Town of Greece* decision, while acknowledging that *Lemon* is "much criticized").

that "*any*" Establishment Clause test must be informed by "historical practices and understandings." *Id.* at 1819 (emphasis added).

Confirming the centrality of the historical inquiry will not resolve every Establishment Clause issue—but it will ensure that lower courts have a rule they can readily apply, and thereby mitigate the inconsistencies that linger in Establishment Clause jurisprudence. *See* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill Rts. J. 73, 140 (2005) (noting that although historical analysis cannot answer all Establishment Clause questions, "it does resolve difficulties and inconsistencies that have bedeviled courts and commentators for years").

Town of Greece is already the law. Given the many benefits of the historical approach to the Establishment Clause—and the many detriments of the muddled prior precedent—this Court should reaffirm it.

B. Church Plans Have Operated Free Of Government Interference Since The Early 1700s

To apply the historically-accepted practice test of *Town of Greece*, the Court must first examine the origins of the church plan exemption and the history of church pension programs generally. That inquiry confirms that there is a long tradition of governmental non-interference in the operation of church pension plans.

Church pension programs have operated in America since the early 1700s. As early as 1717, the Presbyterian Church in Philadelphia established the "Fund for Pious Uses," a charitable venture intended to provide financial assistance to colonial ministers

and their families. *See* R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions: The Roots and Growth of Pensions in the Presbyterian Church (U.S.A.)* 7 (1989). The first recorded disbursement from the Fund for Pious Uses was in 1719, to the widow of a deceased minister. *Id.* at 9. In 1763, the Methodist Church established the "Preachers' Fund" to make provision "first for the old or sickly preachers, and their families (if they have any); then for the widows and children of those that are dead." Luke Tyerman, *The Life and Times of the Rev. John Wesley, M.A., Founder of the Methodists* 479 (1872); *see* Vol. III, Abel Stevens, *The History of the Religious Movement of the Eighteenth Century Called Methodism* 132 (1861). By contrast, the first non-religious employer to provide a retirement plan was the American Express Company—in 1875. *See* Patrick W. Seburn, "Evolution of Employer-Provided Defined Benefit Pensions," *in Employee Benefits Survey: A BLS Reader* (1995).

By the time ERISA was enacted in 1974, church pension plans had been operating free from colonial and then federal regulation for more than 250 years. Acting in response to a series of pension failures in the private sector—most notably, the shutdown of the Studebaker automobile plant in South Bend, Indiana resulting in a default on the company's pension plan—Congress devised a comprehensive regulatory regime designed to mitigate default risk. *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683, 726–36 (2001). Governmental plans, church plans, and certain deferred compensation plans for senior execu-

tives were exempted from ERISA's coverage. *See Employee Benefits Law* 110, 2-12 to 2-18 (Jeffrey Lewis et al. eds., 3d ed. 2012).

As enacted, the definition of "church plan" was limited. Under the original exemption, a church plan could cover only individuals employed by the church itself. *See* Pub. L. No. 93-406, 88 Stat. 829, 838 (1974). This narrow definition was problematic because it did not exempt benefit programs that covered church agency employees. *See generally* G. Daniel Miller, *"The Church Plan Definition—A Reply to Norm Stein,"* ABA Section of Labor and Employment Law, Employee Benefits Committee Newsletter (Fall 2004) [hereinafter *The Church Plan Definition*]. In 1975, a coalition of chief executive officers and program directors of several dozen church benefit programs formed an organization then known as the Church Alliance for Clarification of ERISA (CACE) to advocate for a legislative amendment that would ensure that church plan status was preserved for the benefit plans of church "agencies." *Id.*

In 1980, Congress amended ERISA to provide that organizations "controlled by" or "associated with" a church may qualify for the church plan exemption. *See* Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1304 (1980) (codified at ERISA §3(33)(C), 29 U.S.C. §1002(33)(C)). The amendment had a retroactive effective date of January 1, 1974—one year prior to the effective date of ERISA itself. *See id.*, 94 Stat. 1307.

For purposes of the Establishment Clause, one feature of this history bears particular emphasis: The sponsors of the church plan amendment in both the House and Senate explicitly acknowledged the long history of church plans in the United States. When

the bill was first introduced on the House floor, Representative Conable prefaced his remarks as follows:

> For many years our church plans have been operating responsibly and providing retirement coverage and benefits for the clergymen and lay employees of the churches and their agencies. Some of the church plans are extremely old, dating back to the 1700's. The median age of church plans is at least 40 years. Churches are among the first organizations to found retirement plans in the United States.

124 Cong. Rec. 12106 (1978) (Statement of Rep. Conable).

Senator Talmadge, introducing companion legislation on the Senate floor, similarly observed: "The church plans in this country have historically covered both ministers and lay employees of churches and church agencies. These plans are some of the oldest retirement plans in the country." 124 Cong. Rec. 16522 (1978) (Statement of Sen. Talmadge); *see also* 125 Cong. Rec. 10052 (1979) (Statement of Sen. Talmadge) (similar). The legislative history of the 1980 amendment reflects both awareness of and respect for the longstanding role of church pension plans in this country—as well as the fact that many of these plans covered lay employees of church agencies. Indeed, the IRS has regularly interpreted ERISA consistent with this understanding, approving church plans for exemption—including church *agency* plans—in over thirty years of private letter rulings. *See The Church Plan Definition*, n.68.

Thus, church pension plans were conceived, established, and dispensing employee benefits even before the Founding—more than 250 years before ERISA came on the scene. With the exception of an aberrant

six-year period immediately following the enactment of ERISA, church plans—including plans covering lay employees of church agencies—have operated free from colonial and then federal regulation from 1717 until the present.

Moreover, Congress swiftly recognized and corrected the problem caused by ERISA's initial, restrictive definition of "church plan" with a retroactive amendment. As a result, the specific statutory religious accommodation at issue has been the law for more than 40 years, and the practice of non-interference has been the law for nearly three centuries. Under *Town of Greece*, this long history of governmental non-interference with church pension plans strongly supports of the constitutionality of the challenged exemption.

Given the "historical practic[e]" that undergirds and informs the church plan exemption, 134 S. Ct. at 1819, applying the exemption to Petitioners and other church-affiliated agencies would not violate the Establishment Clause, or even present a serious constitutional question. Accordingly, to the extent Plaintiffs urge this Court to construe the church plan exemption narrowly to avoid a constitutional question, their argument is pure makeweight and should be rejected.

III. PLAINTIFFS' INTERPRETATION OF THE STATUTE—NOT DEFENDANTS'—WOULD RAISE AN ESTABLISHMENT CLAUSE QUESTION

As *amici* have shown, the longstanding IRS interpretation of the church plan exemption does not raise the specter of an Establishment Clause violation. If anything, it is Plaintiffs' interpretation of the statute that raises a constitutional question by requiring religious institutions, in order to receive the exemption's benefits, to adopt a particular organizational form—

one that unifies their ecclesiastical and financial organizations at the time of pension plan formation. Plaintiffs' rule thus would privilege religious organizations that unify their financial, ecclesiastical, and other operations in a single "church" organization over those that separate their "church" from their ancillary operations, thus violating "[t]he clearest command of the Establishment Clause": non-discrimination among religions. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Plaintiffs demand that the line between exempt and non-exempt organizations be drawn so that religious institutions with a single, unified internal structure be given favored status, while religious organizations that choose to separate their organizations are punished. The possible issues with Plaintiffs' approach are not difficult to foresee. If a group of religious adherents are required by their faith to maintain some formal separation between their sacred ecclesiastical offices and the pecuniary matters attended to by investment managers, they would be doctrinally required to create their benefit plan under an organization that is separate from their main "church."[14] Yet, their faith-based decision would place them outside of the benefits conveyed by the statute.

Indeed, Plaintiffs have admitted that some churches may not establish plans under their primary ecclesiastical organization (leading them to do so under a separate board) for "many reasons, *doctrinal* and practical." Br. of Respondent in Opposition to Certiorari at 34, *Advocate Health Care Network v. Stapleton*,

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[14] While the reasoning behind such religious convictions may not make sense to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

137 S. Ct. 546 (No. 16-74) (emphasis added). Yet, Plaintiffs insist this will lead to no constitutional concerns, because "Congress need not make special provision so that organizations may establish a 'church plan' even if the churches with which they claim affiliation choose not to do so." *Id.* This assertion is simply wrong. If Congress preferences one group of religious institutions for their "doctrinal" choices while punishing another group for following different doctrine, Congress would clearly violate the Establishment Clause's command that no religious denomination be officially preferred over another. *See Larson*, 456 U.S. at 244.

Moreover, a requirement that religious organizations re-structure their corporate form would be a serious intrusion into religious organizations' internal affairs—a result the Religion Clauses do not permit. This Court's First Amendment jurisprudence "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 132 S. Ct. at 704 (internal quotation marks omitted). This power of autonomy and freedom allows "religious organizations" latitude "in ordering their internal affairs," including protecting them from government interference when they "select their own leaders, define their own doctrines, resolve their own disputes, *and run their own institutions*." *Amos*, 483 U.S. at 341 (Brennan, J., concurring) (emphasis added) (internal quotation marks omitted). Thus, while laws of general applicability may govern a religious organization's "outward physical acts," the government is not free to engage in "interference with an

internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707 (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)); *see also* Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 834–37 (2012) (noting that *Hosanna-Tabor*'s protection of "internal church decision[s]," "augurs a new birth of freedom" from governmental interference for religious communities).

Interfering directly in the ordering of religious organizations' internal affairs—by forcing such organizations to at least temporarily unify their ecclesiastical bodies and pension boards—implicates the internal church autonomy protected by the First Amendment. As recognized in *Hosanna-Tabor*, the internal affairs of all sorts of religious organizations are protected under the First Amendment. Indeed, the opinion conspicuously avoids distinguishing among "church[es]," "religious group[s]," and "religious institution[s]," and instead recognizes that the internal affairs of all such organizations are protected from government interference by the Religion Clauses. *Hosanna-Tabor*, 132 S. Ct at 699, 702, 705; *see also* Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 Geo. J. L. & Pub. Pol'y 493 (2012) (noting the Court's refusal to cabin its holding to particular religious organizations). Interpreting the church plan exemption to grant privileges to only a subset of religious organizations—those institutions that unify their financial administration and ecclesiastical offices under one institutional roof (at least at the time of pension plan formation)—could "discriminate against religious institutions which are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." *Spencer v. World Vision, Inc.*, 633

F.3d 723, 728 (9th Cir. 2011) (O'Scannlain, J., concurring, joined by Kleinfeld, J) (internal quotation marks omitted).

Thus, it is Plaintiffs' construction of ERISA's church plan exemption—*not* Defendants'—that gives rise to legitimate constitutional concerns. Recognizing that the 1980 amendments brought *all* First Amendment-protected religious organizations under the exemption—including those that create their pension plans under an auxiliary organization—would avoid those problems.

CONCLUSION

For the foregoing reasons, the Court should reject Plaintiffs' Establishment Clause Arguments.

Respectfully submitted.

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